

LETTER OPINION
96-L-129

July 11, 1996

Mr. Richard J. Riha
Burleigh County Assistant
State's Attorney
514 East Thayer Avenue
Bismarck, ND 58501

Dear Mr. Riha:

Thank you for your letter concerning the interpretation of North Dakota Century Code (N.D.C.C.) § 19-03.1-23(6). Specifically, you ask whether possession of one ounce or less of marijuana within 1,000 feet of the real property comprising a public or private elementary or secondary school or a public vocational school should be charged as a class B felony or as a misdemeanor appropriate under the circumstances.

The crime of possession of a controlled substance is set out in N.D.C.C. § 19-03.1-23(6), which reads as follows:

It is unlawful for any person to willfully, as defined in section 12.1-02-02, possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter, but any person who violates section 12-46-24 or 12-47-21 may not be prosecuted under this subsection. Except as provided in this subsection, any person who violates this subsection is guilty of a class C felony. If the person is in or on, or within one thousand feet [300.48 meters] of the real property comprising a public or private elementary or secondary school or a public vocational school, the person is guilty of a class B felony. Any person who violates this subsection regarding possession of one-half ounce [14.175 grams] to one ounce [28.35 grams] of marijuana, is guilty of a class A misdemeanor. Any person, except a person operating a motor vehicle, who violates this subsection regarding possession of less than one-half ounce [14.175 grams] of marijuana is guilty of a class B misdemeanor. Any person who violates this subsection regarding possession of less than one-half ounce [14.175 grams] of marijuana while

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operating a motor vehicle is guilty of a class A misdemeanor.

Possession of any controlled substance is a class C felony except as provided in this section. Specifically excepted are possession of a controlled substance within 1,000 feet of the real property comprising a public or private elementary or secondary school or a public vocational school (class B felony), possession of one-half ounce to one ounce of marijuana (class A misdemeanor), possession of less than one-half ounce of marijuana (class B misdemeanor), and possession of less than one-half ounce of marijuana while operating a motor vehicle (class A misdemeanor).

The language enhancing possession of a controlled substance to a class B felony if committed within 1,000 feet of a school was a part of House Bill 1062 and was adopted during the 1993 legislative session. 1993 N.D. Sess. Laws ch. 128, § 3. The language of the subsection indicating that possession of a controlled substance is a class C felony, except when involving one ounce or less of marijuana, was in existence at the time of the 1993 amendment. Thus, prior to 1993, it was the clear intent of the statute to grade possession of one ounce or less of marijuana under all circumstances at a misdemeanor level.

In determining the intention of the Legislature, a court may consider a number of factors, including the circumstances under which the statute was enacted, the legislative history, and the common law or former statutory provisions, including laws upon the same or similar subjects. N.D.C.C. § 1-02-39. "The cardinal rule of statutory interpretation is that the interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes." O'Fallon v. Pollard, 427 N.W.2d 809, 811 (N.D. 1988).

House Bill 1062, passed in 1993, is very similar to 1989 Senate Bill 2332 and 1991 House Bill 1079. Hearing on H. 1062 Before the House Comm. on the Judiciary 53rd Leg. (January 13, 1993) (Testimony of Representative Ron Carlisle and Judge Dennis A. Schneider). The 1989 and 1991 legislation were vetoed by Governor George Sinner. The 1993 legislative history does not specifically refer to this subsection. Testimony on the 1991 bill indicates that the bill dealt with felony, not misdemeanor, offenses. Hearing on H. 1079 Before the House Comm. on the Judiciary 52nd Leg. (January 16, 1991) (Testimony of Judge Ronald L. Hilden). In the 1989 legislative history, Sharon Snyder, Chairman of Families Against Drug Dealers, in presenting Senate Bill 2332, explained that the change in the possession laws raised the

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normal possession crime from a class C felony to a class B felony. Hearing on S. 2332 Before the Senate Comm. on the Judiciary 51st Leg. (February 6, 1989) (Testimony of Sharon Snyder). The bill summary of the 1989 legislation prepared by the Legislative Council staff indicates that the "bill also increases the penalty for possessing a controlled substance within 1,000 feet of a school from a class C felony to a class B felony." There appears to be no clear intent of the Legislature to change the penalties for possession of one ounce or less of marijuana near a school. In fact, the 1989 and 1991 legislative history regarding very similar legislation to 1993 House Bill 1062 indicates that the intent of the legislation was to enhance only the class C felony offense to a class B felony.

In construing a statute, we consider the entire enactment of which it is a part and, to the extent possible, interpret the provision consistent with the intent and purpose of the entire act. Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585 (N.D. 1986). In determining legislative intent, the court may consider such matters as the objects sought to be obtained, the statute's connection to other related statutes, and the consequences of a particular construction. State v. Moen, 441 N.W.2d 643 (N.D. 1989). Other portions of 1993 House Bill 1062, currently codified in N.D.C.C. § 19-03.1-23, specifically excepted marijuana from mandatory sentencing provisions. See N.D.C.C. § 19-03.1-23(1)(b), (3) and (4). Subsection 6 of N.D.C.C. § 19-03.1-23 must be construed in the context of the entire statute. In The Interest of M.Z. v. Stark County Social Services Board, 472 N.W.2d 222 (N.D. 1991).

Recognizing that criminal statutes are construed against the government and in favor of the accused, State v. Pippin, 496 N.W.2d 50, 52 (N.D. 1993), the greater weight of authority indicates that it was not the intent of the Legislature to enhance the penalty for possession of one ounce or less of marijuana within 1,000 feet of a school.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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